No. 92-1639

In the Supreme Court of the United States

OCTOBER TERM, 1993

THE CITY OF CHICAGO, ET AL., PETITIONERS

vs.

ENVIRONMENTAL DEFENSE FUND, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether Section 3001(i) of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6921(i), exempts a resource recovery facility's municipal waste combustion ash from regulation as a hazardous waste under Subtitle C of that Act.

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INTEREST OF THE UNITED STATES

The United States plays a leading role through the Environmental Protection Agency (EPA) in implementing and administering federal environmental laws, including the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.* EPA addressed the statutory question at issue here through a directive from its prior Administrator to the EPA Regional Administrators, and that directive remains in effect.

STATEMENT

Petitioners City of Chicago and its mayor operate a municipal incinerator that burns solid waste and recovers energy, leaving a residue of municipal waste combustion

(MWC) ash that is deposited in a landfill. Respondents Environmental Defense Fund, Inc., *et al.* (EDF) brought this action against petitioners alleging that they were violating provisions of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, by failing to dispose of the MWC ash in accordance with the hazardous waste management requirements of RCRA Subtitle C, 42 U.S.C. 6921-6939. The United States District Court for the Northern District of Illinois granted summary judgment for petitioners, ruling that RCRA Section 3001(i), 42 U.S.C. 6921(i), exempts the ash residue from Subtitle C regulation. See Pet. App. 22a-37a. A divided court of appeals reversed. *Id.* at 5a-21a. This Court vacated that judgment and remanded the case for reconsideration in light of a directive that the Administrator of the EPA had recently issued to the EPA Regional Administrators. On remand, the court of appeals reinstated its prior judgment. *Id.* at 1a-4a.

1. RCRA is a comprehensive environmental statute that, among other things, empowers EPA to regulate hazardous wastes from "cradle to grave." *Environmental Defense Fund* v. *EPA*, 852 F.2d 1316, 1318 (D.C. Cir. 1988), cert. denied, 489 U.S. 1011 (1989). Subtitle C of RCRA requires EPA to identify and list hazardous wastes, § 3001, 42 U.S.C. 6921, and to promulgate standards governing hazardous waste generators and transporters, §§ 3002, 3003, 42 U.S.C. 6922, 6923, and owners and operators of hazardous waste treatment, storage, and disposal facilities, § 3004, 42 U.S.C. 6924. EPA has directed hazardous waste generators to comply with handling, recordkeeping, storage, and monitoring requirements when they treat, store, or arrange for transportation or disposal of hazardous waste. See 40 C.F.R. Pt. 262.

In 1980, EPA issued regulations, pursuant to Section 3001 of RCRA, identifying and listing certain solid wastes

as hazardous wastes. See 45 Fed. Reg. 33,084. Based on the agency's interpretation of Congress's intent, EPA excluded various solid wastes that might otherwise be treated as hazardous waste from regulation under Subtitle C. See *id.* at 33,096-33,097. EPA specifically provided a "household waste" exclusion, stating in relevant part:

> The following solid wastes are not hazardous wastes:
>
> (1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or reused. "Household waste" means any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels).

Id. at 33,120 (codified as amended at 40 C.F.R. 261.4(b)(1) (1982)). EPA stated that the exclusion would extend to waste residues remaining after treatment, such as incinerator ash. 45 Fed. Reg. 33,099 (1980). See Pet. App. 25a-26a.

Four years later, Congress enacted the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221, which revised and supplemented RCRA in various respects. That Act (§ 213, 98 Stat. 3241) added Section 3001(i), entitled "Clarification of household waste exclusion." 42 U.S.C. 6921(i). Section 3001(i) states:

> A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if—
>
> (1) such facility—
>
> (A) receives and burns only—

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

42 U.S.C. 6921(i). Shortly thereafter, EPA revised its regulation containing the household waste exclusion. 50 Fed. Reg. 28,702 (1985). EPA retained its original regulatory language, but added the language of Section 3001(i) virtually verbatim. 40 C.F.R. 261.4(b)(1). See Pet. App. 26a-27a.

2. Since 1971, petitioner City of Chicago has owned and operated a resource recovery incinerator, the Northwest Waste-to-Energy Facility. The facility burns approximately 350,000 tons of solid waste each year, amounting to about 14% of the City's solid waste, and produces energy that is used within the facility and is sold to other companies. The City has disposed of the combustion residue—110,000 to 140,000 tons of MWC ash per year—at a landfill in Three Oaks, Michigan. Prior to this suit, the City, like many other municipalities, did not manage MWC ash as a RCRA Subtitle C hazardous waste. Pet. App. 5a-7a, 23a.[1]

[1] As of 1991, approximately 150 facilities incinerated municipal solid waste in a resource recovery facility. S. Levy, *Municipal Waste Combustion Inventory* 1 (EPA July 1992). In 1990, those facilities burned in aggregate about 29.7 million tons of municipal solid waste out of an estimated 195.7 million tons generated. *Characterization of Municipal Solid Waste in the United States: 1992 Update* 3-2 (EPA July 1992). See also Pet. 3-4.

In 1988, EDF filed a complaint against petitioners under the citizen suit provisions of RCRA, § 7002, 42 U.S.C. 6972, alleging that petitioners were violating provisions of RCRA and EPA's RCRA regulations governing the management of hazardous waste. According to EDF, the MWC ash from the Northwest Waste-to-Energy Facility contained sufficient levels of lead and cadmium to subject the residue to regulation as a hazardous waste under RCRA Subtitle C. Petitioners responded that RCRA Section 3001(i) nevertheless excluded the MWC ash from Subtitle C requirements. The parties filed cross-motions for summary judgment contesting the application of Section 3001(i). Pet. App. 5a-7a, 22a-24a.

EDF claimed that although Section 3001(i) exempted petitioners from RCRA Subtitle C requirements related to "treating, storing, disposing of, or otherwise managing hazardous wastes," 42 U.S.C. 6921(i), it did not exempt petitioners from Subtitle C requirements related to generation of a distinct waste product, the MWC ash. Petitioners responded that Section 3001(i)'s reference to "disposing of, or otherwise managing hazardous wastes" exempted from Subtitle C requirements the entire process of incinerating the waste in a resource recovery facility, including management of the ash residue. Pet. App. 7a, 24a, 27a-28a.

The district court agreed with petitioners that RCRA Section 3001(i) exempts MWC ash produced at resource recovery facilities from regulation as hazardous waste. Pet. App. 7a, 24a-32a. The court denied petitioners' mo-

tion for summary judgment, however, and allowed EDF to engage in discovery on whether the Chicago facility adequately met Section 3001(i)'s provisions prohibiting the facility from accepting commercial and industrial hazardous wastes. Pet. App. 7a, 32a-33a. EDF subsequently stipulated that it would not contest the adequacy of the facility's compliance with those prohibitions and that it would not oppose petitioners' renewed motion for summary judgment, which the court granted. See *id.* at 7a-8a, 34a-37a.

3. The court of appeals reversed. As a preliminary matter, the court rejected petitioners' claim that intervening legislation had rendered the matter moot. Pet. App. 8a-9a. Turning to the merits, the court observed that petitioners and EDF both relied on the "plain words of section 3001(i)" and that "EPA's interpretation and the legislative history of the statute do little to resolve this stand-off." *Id.* at 10a-11a. See *id.* at 10a-18a (analyzing those sources). The court ultimately chose to rely on "what the statute actually says." *Id.* at 18a.

The court reasoned that Section 3001(i) "mentions 'the treating, storing, disposing of or otherwise *managing*' of the household and commercial waste, but fails to include among these activities *generating* a different waste product entirely." Pet. App. 18a. The court examined the statutory definitions of the quoted terms and ruled that they "exclude 'generation,' which is separately defined as 'the act or process of producing hazardous waste.' 42 U.S.C. § 6903(6)." *Id.* at 19a. It concluded:

> There is no overlap whatsoever, then, between hazardous waste "management" and hazardous waste "generation." It follows, therefore, that if the language of the exclusion is limited to "management" activities of resource recovery facilities, "generating" activities are subject to regulation.

Ibid. The court accordingly held that "ash generated from the incinerators of municipal resource recovery facilities is subject to regulation as a hazardous waste under Subtitle C of RCRA." *Id.* at 20a.

Judge Ripple dissented. He stated that the court should affirm the judgment for the reasons set forth in *Environmental Defense Fund, Inc.* v. *Wheelabrator Technologies, Inc.*, 725 F. Supp. 758 (S.D.N.Y. 1989), aff'd, 931 F.2d 211 (2d Cir.), cert. denied, 112 S. Ct. 453 (1991), which held that MWC ash from resource recovery facilities is exempt from regulation under Subtitle C. Pet. App. 21a.[2]

4. The City of Chicago petitioned for a writ of certiorari to resolve the conflict between the decisions of the Second and Seventh Circuits. Pet. in No. 91-1328. EDF agreed that the conflict should be resolved by this Court and did not oppose the petition. Resp. Br. in No. 91-1328. The Court thereafter issued an order inviting the Solicitor General to present the views of the United States. On September 18, 1992, while that invitation to the Solicitor General was outstanding, EPA Administrator William Reilly issued a memorandum to EPA Regional Administrators setting out EPA's interpretation of Section 3001(i). Pet. App. 41a-49a. The Reilly memorandum directed the Regional Administrators to treat MWC ash as exempt from hazardous waste regulation under Subtitle C of RCRA. *Ibid.* Thereafter, the Solicitor General suggested that the Court grant the petition, vacate the decision and remand the case to the Seventh Circuit for further consideration in light of EPA's directive. U.S. Amicus Br. in No. 91-1328. This Court followed that course and

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[2] Because of the apparent conflict with the Wheelabrator decision, the court of appeals' opinion was circulated among all active circuit judges prior to release. No judge recommended rehearing en banc. See Pet. App. 5a n.*

returned the case to the Seventh Circuit. *City of Chicago* v. *Environmental Defense Fund,* 113 S. Ct. 486 (1992).

5. After requesting and receiving statements of positions from petitioners and EDF, the court of appeals reinstated its previous decision. The majority held that the Reilly memorandum did not affect its analysis, because the statute's plain language was dispositive. Pet. App. 2a. Judge Ripple again dissented. He stated that an agency has an obligation to review and insure the reasonableness of its interpretations on a continuing basis. Judge Ripple concluded that Administrator Reilly's review of the "admittedly ambiguous issue" and his reassessment of the agency's "early pronouncements" were responsible agency actions and deserved "deferential review." *Id.* at 4a.

SUMMARY OF ARGUMENT

The United States submits that Section 3001(i) of RCRA is ambiguous with respect to regulation of MWC ash. Although petitioners and EDF both invoke the "plain language" of Section 3001(i), the statute does not speak directly to the issue presented here. Indeed, EPA, which is charged with administering RCRA, has grappled with that issue since the statute's enactment and has repeatedly urged Congress to clarify the matter. At the same time, all of the courts that have addressed the issue (except the divided panel below) have acknowledged that the statute is ambiguous. In these circumstances, the Court should give deference to "a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844 (1984).

Administrator Reilly formally articulated EPA's interpretation in his 1992 directive to the Regional Administrators, and that directive remains in force. The Court should therefore defer to the reasoned analysis contained therein. The directive sets out an interpretation that is consistent with the text and legislative history of Section 3001(i), that reconciles the statute and the agency's regulatory scheme, and that takes into account important policy and technical considerations that are within EPA's special expertise. Deference is no less appropriate merely because the Administrator's construction is not the only reasonable interpretation, it has evolved over time, and it could be revised again in light of further technological or policy considerations.

ARGUMENT

EPA'S INTERPRETATION OF SECTION 3001(i) IS ENTITLED TO DEFERENCE

A. Section 3001(i) Is Ambiguous With Respect To Regulation Of MWC Ash.

1. Petitioners and EDF each have contended throughout this litigation that the plain language of Section 3001(i) supports their respective positions. See Pet. App. 10a-11a. They are able to rely on the same text to support contradictory conclusions, because the statutory language is ambiguous with respect to the specific question at issue. Section 3001(i) states in relevant part:

> A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter if [certain conditions are satisfied].

42 U.S.C. 6921(i). That provision, which is captioned as a "clarification" of EPA's pre-existing household waste ex-

clusion, is amenable to at least two different constructions.

On the one hand, the provision can plausibly be interpreted to mean that if a facility is one that "recover[s] energy from the mass burning of municipal solid waste" and it satisfies the prescribed conditions, then the facility as a whole is entitled to a regulatory exemption with respect to any activity that, in the absence of the exemption, could constitute "treating, storing, disposing of, or otherwise managing hazardous wastes." 42 U.S.C. 6921(i). Under that construction, EPA's household waste exclusion, set out at 40 C.F.R. 261.4(b)(1), would continue to apply to the incineration residues, notwithstanding the facility's commingling of "household" and non-hazardous "commercial or industrial" waste. The facility would enjoy an exemption from RCRA Subtitle C regulation for actions taken in "treating, storing, disposing of, or otherwise managing" both the incoming waste streams and the MWC ash, which would continue to be subject to the household waste exclusion even after leaving the facility.

On the other hand, Section 3001(i) can be construed in a more restrictive sense to mean that the discrete aspects of the facility's energy recovery process specifically referenced in the statute—treatment, storage, disposal, and other management activities—do not include a non-referenced activity—such as the "generation" of hazardous waste. The facility would enjoy an exemption from RCRA Subtitle C regulation when "treating, storing, disposing of, or otherwise managing" any hazardous waste products that are present in the incoming waste streams, despite contractual controls established by the owner/operator of the facility. See 42 U.S.C. 6921(i)(2). But the facility would be subject to regulation under RCRA Subtitle C if the incineration process generates a new product—MWC ash—that qualifies as a hazardous waste.

2. Although one may debate the relative merits of the competing constructions, both are plausible and consistent with the statutory text. At bottom, "Congress has not directly addressed the precise question at issue"—whether the household waste exclusion, as clarified by Section 3001(i), applies to MWC ash. *Chevron U.S.C. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Indeed, the ambiguity in Section 3001(i) of RCRA is not unlike the one that this Court encountered in *Chevron,* where the question was whether the Clean Air Act's provisions regulating new or modified major stationary sources, 42 U.S.C. 7502(b)(6), should be applied on a plantwide or a component-by-component basis. See 467 U.S. at 839-840. As in *Chevron,* EPA has considered the matter "not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena." *Id.* at 863. And as in *Chevron*, EPA's interpretation has consequently evolved over time.

When EPA promulgated its 1980 household waste exclusion, it clearly envisioned that the regulatory exclusion would exempt incineration residue from Subtitle C regulation. EPA stated in the preamble to that regulation that it was excluding the entire household waste stream from regulation, observing:

> Since household waste is excluded in all phases of its management, residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste. * * *

45 Fed. Reg. 33,099 (1980). EPA explained that such wastes, however, "must be transported, stored, treated and disposed of in accord with applicable State and federal requirements concerning management of solid waste (including any requirements specified in regulations under Subtitle D of RCRA)." *Ibid.*

Five years later, when EPA amended the household waste exclusion in response to Congress's enactment of Section 3001(i), EPA expressed doubt whether MWC ash should be excluded. EPA stated in the preamble to the amended regulation:

> The statute is silent as to whether hazardous residues from burning combined household and non-household, non-hazardous waste are hazardous waste. These residues would be hazardous wastes under present EPA regulations if they exhibited a characteristic [of hazardous waste]. The legislative history does not directly address this question, although the Senate report can be read as enunciating a general policy of nonregulation of these resource recovery facilities if they carefully scrutinize their incoming wastes. On the other hand, residues from burning could, in theory, exhibit a characteristic of hazardous waste even if no hazardous wastes are burned, for example, if toxic metals become concentrated in the ash. Thus, the requirement of scrutiny of incoming wastes would not assure non-hazardousness of the residues.

50 Fed. Reg. 28,725-28,726 (1985). The agency continued:

> EPA believes that the principal purpose of section 3001[i] was to prevent resource recovery facilities that may inadvertently burn hazardous waste, despite good faith efforts to avoid such a result, from becoming subject to the Subtitle C regulations. EPA does not see in this provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste.

Id. at 28,726. See Pet. App. 30a n.4. Although those preamble passages are somewhat equivocal, they have been

widely viewed as indicating that if MWC ash "exhibits a characteristic of hazardous waste," *ibid.*, the ash is subject to RCRA's Subtitle C requirements.[3]

Since 1985, EPA officials have suggested that, in that respect, the analysis contained in the 1985 regulatory preamble may be incorrect and have urged Congress to clarify its intent.[4] Congress subsequently included a provision in

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[3] EPA also stated, however, that the Hazardous and Solid Waste Amendments do not "impose new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste, and the Agency has no plans to impose additional responsibilities on these facilities." 50 Fed. Reg. 28,726 (1985). EPA determined that "any future additional regulation of their residues would have to await consideration of the important technical and policy issues that would be posed in the event serious questions arose about the residues." *Ibid.*

[4] In 1987, EPA's Assistant Administrator for the Office of Solid Waste and Emergency Response stated to a Senate subcommittee that "[t]he Agency has reexamined that [1985] interpretation and now concludes that it may have been in error. The Agency believes that the language and legislative history of Section 3001(i) were probably intended to exclude these ash residues from regulation under Subtitle C." *Resource Conservation and Recovery Act – Oversight: Hearings Before the Subcomm. on Hazardous Wastes and Toxic Substances of the Senate Comm. on Environment and Public Works,* 100th Cong., 1st Sess. 427-428 (1987). See Pet. App. 14a-15a. In 1988, the Administrator testified to a House subcommittee that "there is ambiguity within the law and I think the law should be clarified," but he also indicated that the Agency would not take action to clarify its interpretation of the law out of deference to Congress, which was at the time considering legislation to amend the provision. *Municipal Incinerator Ash: Hearing on H.R. 2517, 4255, and 4357 Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce,* 100th Cong., 2d Sess. 72 (1988). In 1989, EPA's Director of the Office of Solid Waste stated to a House subcommittee that EPA continued to follow the 1985 interpretation, but she noted that there is "substantial controversy surrounding that interpretation," "the law is ambiguous given it is silent with regard to treatment of ash under [Section 3001(i)]," and "it needs to be clari-

the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, stating:

> For a period of 2 years [until November 15, 1992] * * * ash from solid waste incineration units burning municipal waste shall not be regulated by the Administrator of the Environmental Protection Agency pursuant to section 3001 of the Solid Waste Disposal Act.

§ 306, 104 Stat. 2584. Since enactment of that "moratorium" provision, however, Congress has taken no action to clarify whether it intends MWC ash to be exempt permanently from Subtitle C regulation, and has, as a body, remained silent on this controversy.[5]

In light of the considerable uncertainty surrounding the issue, the imminent termination of the two-year mora-

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fied." *Regulation of Municipal Solid Waste Incinerators: Hearings on H.R. 2162 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce,* 101st Cong., 1st Sess. 33 (1989). See Pet. App. 13a-16a. See also *Wheelabrator,* 725 F. Supp. at 767-768.

[5] In the past several years, Congress has considered various proposals that would clarify how MWC ash should be regulated. In 1988, Congress considered legislation that would have required specific standards for facilities disposing of MWC ash. See 53 Fed. Reg. 33,314, 33,328 (1988). In 1988, a bill was introduced that would have allowed disposal of MWC ash in certain RCRA Subtitle D landfills which met additional requirements (the so-called "D Plus" approach). See *Municipal Incinerator Ash: Hearings on H.R. 2517, 4255, and 4357 Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce,* 100th Cong., 2d Sess. 72 (1988). See also Pet. App. 12a-13a. In the session that ended in 1992, Congress considered a bill that would have amended RCRA Subtitle D to establish a separate regulatory framework for MWC ash. See S. Rep. No. 301, 102d Cong., 2d Sess. 56-60 (1992). Various pertinent provisions have also been introduced in the current session and are currently pending before Congress. See H.R. 424, 103d Cong., 1st Sess. (1993); H.R. 2017, 103d Cong., 1st Sess. (1993); H.R. 2488, 103d Cong., 1st Sess. (1993).

torium, and Congress's failure to take legislative action, EPA issued a policy directive to clarify the agency's interpretation of Section 3001(i). See Pet. App. 41a-49a. Administrator Reilly's September 1992 memorandum, which was issued to all EPA Regional Administrators and made publicly available, announced EPA's decision under Section 3001(i) of RCRA "to treat ash generated from the combustion of nonhazardous municipal solid waste at resource recovery facilities * * * as exempt from hazardous waste regulation under RCRA Subtitle C." *Id.* at 41a. That decision "supersede[d] the Agency's earlier view of section 3001(i) as not exempting MWC ash from hazardous waste regulation." *Id.* at 42a. The current Administrator has not revised or revoked that directive, and it therefore remains in effect and continues to bind the Regional Administrators.

As EPA's experience demonstrates, Section 3001(i) is amenable to more than one interpretation. Prior to the court of appeals' decision in this case, the courts that had examined the issue had concluded—in accord with the expert agency charged with administering the statute—that the statutory language is ambiguous as to the issue presented here. See Pet. App. 24a; *Wheelabrator,* 725 F. Supp. at 764, aff'd, 931 F.2d at 212. See also Pet. App. 4a (Ripple, J., dissenting). The Seventh Circuit is the *only* court to conclude that the statutory text is dispositive, and that divided court's reliance on the purported "plain language" seemingly arises from the court's own perplexity in attempting to resolve the issue, rather than from any compelling force in the statute's words. Indeed, the court conducted a preliminary analysis of the statute, its enactment, and EPA's implementation and stated:

> What we have to work with here is a statute subject to varying interpretations, a foggy legislative history, and a waffling administrative agency. Where do we turn?

See Pet. App. 16a. The court then returned to the statutory text and concluded, on second thought, that it should adopt EDF's "plain language" argument, relying in part on "RCRA's policy." *Id.* at 18a-20a. But significantly, the court simplified its task by ignoring the alternative "plain language" argument – viz., petitioners are exempt because the facility enjoys an exemption from RCRA Subtitle C regulation for actions taken in "treating, storing, disposing of, or otherwise managing" both the incoming waste streams and the outgoing MWC ash. 42 U.S.C. 6921(i).

At bottom, the adversaries in this case can each invoke "plain language" in support of their competing interpretations, but neither can definitively refute the other party's construction. The court of appeals chose one "plain language" argument in preference to another, but the fact remains that Congress has not "directly spoken to" the precise question presented in this case. *Chevron,* 467 U.S. at 842. The statute ultimately is ambiguous with respect to the issue presented here. Compare *Rust* v. *Sullivan,* 111 S. Ct. 1759, 1767 (1991).

B. EPA's Interpretation Of Section 3001(i) Is Reasonable

1. This Court's decision in *Chevron* supplies the fundamental principle for resolving this case: A court interpreting an ambiguous provision of a statute administered by an agency must give deference to the agency's interpretation if that interpretation is "reasonable." *Chevron,* 467 U.S. at 844. See, *e.g., Good Samaritan Hospital* v. *Shalala,* 113 S. Ct. 2151, 2159 (1993); *United States* v. *Alaska,* 112 S. Ct. 1606, 1610 (1992); *Pauley* v. *BethEnergy Mines, Inc.,* 111 S. Ct. 2524, 2534 (1991); *Rust* v. *Sullivan,* 111 S. Ct. at 1767; *Pension Ben. Guar. Corp.* v. *LTV Corp.,* 496 U.S. 633, 647-648 (1990); *Sullivan* v. *Everhart,* 494 U.S. 83, 88-89 (1990); *Mead Corp.* v. *Tilley,* 490 U.S. 714, 722 (1989).

As this Court has explained, "when an agency is charged with administering a statute, part of the authority it receives is the power to give reasonable content to the statute's textual ambiguities." *Department of the Treasury* v. *FLRA,* 494 U.S. 922, 933 (1990). "That is a task infused with judgment and discretion, requring the 'accommodation of conflicting policies that were committed to the agency's care.' " *Ibid.* The principle of deference to administrative interpretations

> has been consistently followed by this Court whenever a decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.

Chevron, 467 U.S. at 844 (citations omitted).

Administrator Reilly's directive that Section 3001(i) exempts MWC ash from RCRA Subtitle C regulation is the expert agency's currently operative interpretation of an ambiguous provision of a complex statute. That directive attempts to reconcile the text of Section 3001(i), its legislative history, EPA's pre-existing regulatory program, and the underlying policies of RCRA, which include the goals of protecting the environment and promoting resource recovery from nonhazardous solid waste. See Pet. App. 42a-49a. Under *Chevron,* the proper inquiry now is whether the agency's interpretation "is based on a permissible construction of the statute." 467 U.S. at 842-843. See *Good Samaritan Hospital,* 113 S. Ct. at 2156; *Alaska,* 112 S. Ct. at 1610; *Rust,* 111 S. Ct. at 1759; *LTV Corp.,* 496 U.S. at 648; *Mead Corp.,* 490 U.S. at 722.

To answer that inquiry, a court should examine whether the agency's interpretation is "reasonable," *Pauley,* 111

S. Ct. at 2537, in the sense that it is "rational and consistent with the statute." *Everhart,* 494 U.S. at 89, quoting *NLRB* v. *United Food & Commercial Workers Union, Local 23,* 484 U.S. 112, 123 (1987). As this Court recently noted, "where the agency's interpretation of a statute is at least as plausible as competing ones, there is little, if any reason not to defer to its construction." *Good Samaritan Hospital,* 113 S. Ct. at 2161. Indeed, that approach not only gives proper respect to the agency's congressionally assigned function, but it also assigns the courts to their proper role by directing disputes over policy to the politically accountable branches of government. See *Chevron,* 467 U.S. at 864-865. That approach is particularly appropriate here, where the statutory provision builds upon a pre-existing agency regulation.

2. EPA's interpretation of Section 3001(i) is manifestly rational. As the Reilly memorandum explains, Congress enacted Section 3001(i) to clarify EPA's 1980 household waste exclusion, which exempted household waste from Subtitle C regulation "in all phases of its management, [including] residues remaining after treatment (e.g., incineration, thermal treatment)." 45 Fed. Reg. 33,099 (1980). See Pet. App. 42a-43a. Section 3001(i) incontestably clarified that when a resource recovery facility processes household waste in combination with nonhazardous commercial and industrial waste and in compliance with prescribed requirements, the facility "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes." 42 U.S.C. 6921(i). See Pet. App. 43a-44a. It is not unreasonable to conclude that this "clarification" retains the basic thrust of EPA's pre-existing regulatory provision and continues to exempt the combined household and nonhazardous commercial and industrial waste from regulation "in all phases of its management," including disposal of the resulting incineration residues.[6]

As the former Administrator's memorandum explains, his interpretation is entirely consistent with the statutory text. See Pet. App. 42a-43a. Indeed, Section 3001(i)'s express provision that a qualifying resource recovery facility "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes" reasonably suggests that EPA's household waste exclusion applies to all facets of the facility's operations, including incineration, pre- and post-incineration storage, and disposal of residues. The fact that Section 3001(i) fails to state that the facility shall not be deemed to be "generating" hazardous wastes (see Pet. App. 19a-20a) does not undermine that conclusion. The absence of that term may simply reflect Congress's understanding that resource recovery operations involving conversion of solid waste to energy are comprehensively described by the collective terms Con-

[6] It is helpful to understand how EPA's RCRA regulations operate in this setting. Under those regulations, a person who generates solid waste "must determine if the waste is hazardous" by first "determin[ing] if the waste is excluded from regulation under 40 CFR 261.4." See 40 C.F.R. 262.11. A facility that incinerates waste, reducing it to ash, would find that "[h]ousehold waste, including household waste that has been * * * treated [*e.g.*, reduced to ash]" is excluded from regulation. 40 C.F.R. 261.4(b)(1). The question would arise, however, whether the household waste exclusion continues to apply when "household waste" is incinerated in combination with nonhazardous "commercial or industrial" waste. Section 3001(i) of RCRA—which EPA codified virtually verbatim into 40 C.F.R. 261.4(b)(1)—clarifies *that* point. The municipal facility "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes" if the prescribed conditions are met. See 40 C.F.R. 261.4(b)(1). Thus, the household waste exclusion continues to apply, and the resulting MWC ash remains exempt from hazardous waste regulation.

gress used. See RCRA § 1004(7) and (34), 42 U.S.C. 6903(7) and (34) (defining hazardous waste management and treatment).[7] At most, Congress's silence on that point highlights the fact that Congress has "left a gap for the agency to fill." *Chevron,* 467 U.S. at 843-844. See Pet. App. 44a n.2.

The Reilly memorandum's interpretation of Section 3001(i) is especially plausible when the statute is viewed in its legal context. When Congress acted, it presumably was aware that EPA had interpreted the household waste exclusion to apply to such waste "in all phases of its management," including disposal of incineration residues. See 45 Fed. Reg. 33,099 (1980).[8] Congress did not question or overrule that interpretation when it clarified that the household waste exclusion would apply to a resource recovery facility that burns commingled wastes, and it is therefore reasonable for the Administrator to conclude that Congress ratified that interpretation. See *Cottage Savings Ass'n* v. *Commissioner of Internal Revenue,* 111 S. Ct. 1503, 1508 (1991); *Traynor* v. *Turnage,* 485 U.S. 535, 545-546 (1988); *Commodity Futures Trading Comm'n* v. *Schor,* 478 U.S. 833, 845-846 (1986); *FDIC* v.

[7] Significantly, Section 3001(i) employs terms similar to those that EPA had employed in its prior regulatory exclusion. Compare RCRA § 3001(i), 42 U.S.C. 6921(i) (facility shall not be deemed to be "treating, storing, disposing of, or otherwise managing hazardous wastes") with 40 C.F.R. 261.4(b)(1) (1982) (excluding household waste, including waste "that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or reused") and 45 Fed. Reg. 33,099 (1980) (excluding household waste "in all phases of its management").

[8] Cf. *Lorillard* v. *Pons,* 434 U.S. 575, 581 (1978) ("where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute").

Philadelphia Gear Corp., 476 U.S. 426 (1985). And to the extent the legislative history is relevant, it suggests that Congress intended to retain EPA's interpretation. S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983). See Pet. App. 44a-46a & nn.2-3.

The Reilly memorandum also is consistent with the objectives Congress sought to achieve in enacting Section 3001(i)—protecting the environment and promoting resource recovery from nonhazardous solid waste. See Pet. App. 46a-48a. As in *Chevron,* "Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by th[is] case[ ]." 467 U.S. at 865. Based on EPA's scientific judgment and the safeguards the agency has instituted in implementing other provisions of RCRA, Administrator Reilly determined that those objectives "are best served by exempting MWC ash from hazardous waste regulation." Pet. App. 46a. That determination rests on "significant expertise" and "entail[s] the exercise of judgment grounded in policy concerns." *Pauley,* 111 S. Ct. at 2534. "In those circumstances, courts appropriately defer to the agency entrusted by Congress to make such policy determinations." *Ibid.* See *Chevron,* 467 U.S. at 844-845, quoting *United States* v. *Shimer,* 367 U.S. 374, 382 (1961).[9]

[9] EDF has mistakenly suggested that this approach is "unworkable and makes no sense," because Section 3001(i) does not provide a separate exemption for downstream parties that transport or dispose of the MWC ash. See EDF Br. on Petition 12 n.8, 16 n.10. Under the Administrator's interpretation, the household waste exclusion continues to apply to a qualifying facility's disposal products after they leave the facility. This approach is consistent with the basic thrust of the household waste exclusion, which Section 3001(i) was intended merely to clarify, as applying to exempted waste "in all phases of its

3. As this Court's decision in *Chevron* made clear, deference is appropriate even if the agency has changed its interpretation over time, provided that the agency supplies a reasoned basis for the change. "The fact that the agency has from time to time changed its interpretation * * * does not * * * lead us to conclude that no deference should be accorded the agency's interpretation of the statute." *Chevron,* 467 U.S. at 863. An agency's consistent adherence to a longstanding interpretation may provide an additional reason for deference, but it is not a *sine qua non* for respecting the agency's views. Compare, *e.g., Pauley,* 111 S. Ct. at 2575 (citing a consistent agency practice), with *Chevron,* 467 U.S. at 865 (citing other factors that support deference).

For example, it would provide no reason for a court to reject an agency's changed interpretation if practical experience or technological advances indicate that a revised interpretation is more consonant with congressional intent. Indeed, this Court recently ruled that an agency administrator is not "estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation." *Good Samaritan Hospital,* 113 S. Ct. at 2161. As the Court explained:

> "[A]n administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes."

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management," including disposal of the resulting incineration residues. See note 6, *supra* and accompanying text. Thus, a downstream transporter or disposer may continue to rely on the household waste exclusion when handling MWC ash.

Ibid., quoting *NLRB* v. *Iron Workers,* 434 U.S. 335, 351 (1978) (other citations omitted). To be sure, the Court suggested that the weight that should be given to the agency's changed views "will depend on the facts of individual cases." 113 S. Ct. at 2161. But this Court has repeatedly accorded deference where, as here, the agency provides a reasoned justification for its changed position. *E.g., Rust,* 111 S. Ct. at 1769; *American Hospital Ass'n* v. *NLRB,* 111 S. Ct. 1539, 1546 (1991); *Robertson* v. *Methow Valley Citizens Council,* 490 U.S. 332, 335-336 (1989).

EPA has consistently recognized that Section 3001(i) is silent or ambiguous with respect to the issue presented in this case. See pp. 11-15 *supra.* The agency's contemporaneous interpretation of the 1985 rules codifying Section 3001(i) was replete with doubt as to Congress's intent. See 50 Fed. Reg. 28,725-28,726 (1985). EPA has always acknowedged that a statutory gap exists that must be filled, and it has searched for the best means to do so. The fact that the agency's understanding has evolved over time is no reason to deny deference to the current interpretation of the law in favor of the agency's earlier, less seasoned explication.

Indeed, EPA should not be discouraged from continuing to adjust its position as circumstances warrant. An agency should revise its views as necessary to reflect new learning that better informs the agency's interpretation of statutory provisions. As the Court has explained, "[a]n initial agency interpretation is not instantly carved in stone." *Chevron,* 467 U.S. at 863. Rather, the agency "must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-864. Accord *Rust,* 111 S. Ct. at 1769; *NLRB* v. *Curtin Matheson Scientific, Inc.,* 494 U.S. 775 (1990); *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Ins. Co.,* 463 U.S. 29, 42 (1983),

citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968).[10]

To be sure, an agency changing its course—even if it does not involve "rescinding a rule"—should "supply a reasoned analysis for the change." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. In accordance with that principle, Administrator Reilly provided a reasoned explanation for the new policy. His directive to the EPA Regional Administrators explained that the interpretation is consistent with the text and legislative history of Section 3001(i). See Pet. App. 42a-43a. In addition, the directive addressed important policy considerations that are within EPA's expertise. *Id.* at 46a-49a.

The directive explained that resource recovery from municipal solid waste "is an important component of EPA's integrated waste management approach" that can "reduce the volume of waste that requires disposal" and may result in "recovering significant amounts of energy." Pet. App. 47a-48a. The directive additionally noted that EPA had recently promulgated new criteria for municipal

[10] Thus, the courts of appeals have quite correctly held that a ruling by this Court upholding an agency's interpretation as reasonable does not preclude the agency from subsequently changing its interpretation in light of additional knowledge or experience. See *International Ass'n of Bridge Workers, Local 3* v. *NLRB*, 843 F.2d 770, 776 (3d Cir.), cert. denied, 488 U.S. 889 (1988); cf. *Mesa Verde Constr. Co.* v. *Northern Cal. District Council of Laborers*, 861 F.2d 1124, 1134-1136 (9th Cir. 1988). That approach is sound as an institutional matter. The expert agency that administers the statute is best equipped to revisit and fine tune regulatory programs on a nationwide basis in light of current knowledge, relieving Congress and the judiciary of the need repeatedly to reassess the details of very complicated technical or policy-laden matters. See Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron's *Step Two*, 2 Administrative L.J. 255, 257-260 (1988).

solid waste landfills. 40 C.F.R. Pt. 258.[11] Those criteria contain many requirements that enhance the ability of regulated landfills to contain and manage MWC ash safely:

> The Part 258 criteria impose requirements on municipal landfills that far exceed those previously imposed, including more stringent location restrictions, facility design and operating criteria, groundwater monitoring requirements, corrective action requirements, financial assurance requirements, and closure and post-closure requirements.

Pet. App. 46a-47a. The knowledge that EPA gained through promulgation of the Part 258 criteria and the changed circumstances led it to reevaluate previous policy concerns and to conclude that "disposal of MWC ash in municipal landfills subject to the Part 258 criteria will be protective of human heath and the environment." *Id.* at 47a & n.5.

Thus, Administrator Reilly reviewed the pertinent law, evaluated the relevant policy considerations, applied the available data, and articulated a satisfactory explanation for his decision, providing a " 'rational connection between the facts found and the choice made.' " *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, quoting *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962). His analysis finds additional support in the rulemaking record

[11] EPA promulgated the Part 258 criteria in response to Section 4010(c) of RCRA, which directs EPA to reissue landfill criteria "for facilities that may receive hazardous household wastes or hazardous wastes from small quantity generators under [Section 3001(d)]." 42 U.S.C. 6949a(c). See *Sierra Club* v. *U.S. Environmental Protection Agency*, 992 F.2d 337 (D.C. Cir. 1993). The new Part 258 regulations require landfills to be designed and operated to meet criteria "necessary to protect human health and the environment," taking into consideration "the 'practicable capability' of [such] facilities." See 56 Fed. Reg. 50,983 (1991).

of the Part 258 criteria, which details the scientific, statistical, and statutory analyses supporting promulgation of the new landfill requirements. See 40 C.F.R. Pt. 258, 56 Fed. Reg. 50,978 (1991).[12]

4. Administrator Reilly's directive has not been repealed or superseded, and it therefore continues to state EPA's policy unless and until the agency revisits the issue. Nevertheless, EDF urged and the court of appeals concluded that the directive is not entitled to deference. They have given two reasons—apart from their mistaken reliance on the purportedly "plain" language of the statute, see pp. 9-16, *supra*—for disregarding the outstanding agency interpretation. Neither is persuasive.

First, EDF has contended that Administrator Reilly's directive is not entitled to deference, because the directive is comparable to an agency's "convenient litigating position." Resp. Br. on Remand 6 n.2, quoting *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 212 (1988). See also EDF Br. on Petition 16. That contention is manifestly wrong. Administrator Reilly's directive is a formal interpretation by an agency head that establishes current agency policy, has binding effect on subordinate agency officials, and is therefore a legitimate source for

[12] EPA has conducted additional studies on MWC leachate, using natural and synthetic lining materials commonly employed in the construction of municipal solid waste landfill liners. Those studies indicate that "with proper engineering considerations, carefully selected materials can be expected to perform as designed." *Results of U.S. EPA Research on Municipal Waste Combustion*, Office of Research and Development, Cincinnati, Ohio (EPA March 1993, Draft). In addition, EPA is conducting ongoing, *in situ* studies of leachate from monofills receiving MWC ash. Those studies reveal concentrations of relevant metals within allowable limits. See AWD Technologies, *Municipal Waste Combustion, Ash and Leachate Characterization: Monofill—Fourth Year Study*, Woodburn Monofill, Woodburn, Oregon (March 1992).

Chevron deference. See *Bowen*, 488 U.S. at 212. Cf. *Alaska*, 112 S. Ct. at 1618-1619, citing *United States* v. *Gaubert*, 111 S. Ct. 1267, 1274 (1991) (agencies may establish policy "through administration of agency programs").[13]

Second, the court of appeals concluded that Administrator Reilly's directive was not entitled to deference because EPA had changed its interpretation not just once, but several times. See Pet. App. 2a ("EPA has changed its view so often that it is no longer entitled to the deference normally accorded an agency's interpretation of the statute it administers."); see also *id.* at 16a (referring to "[t]he see-sawing statements from the EPA"). That conclusion is erroneous as a factual matter. EPA has articulated a formal agency position interpreting Section 3001(i) only twice—in the preamble to the 1985 regulations and in Administrator Reilly's 1992 memorandum. Thus, the agency has changed its position on the statute's meaning only once.[14]

[13] EDF cannot accurately compare the Administrator's directive to a mere *pro hac vice* argument from agency counsel that has no independent force. Indeed, EDF's citation to *Bowen* is particularly inapt, because EPA is not a party to this suit and has participated as amicus curiae at this Court's invitation. The fact that Administrator Reilly issued his directive while this Court's invitation was pending provides no reason for denying deference. There is nothing inappropriate in an agency's providing formal regulatory guidance concerning issues that have given rise to litigation. Moreover, Administrator Reilly had an independent reason for providing clarification, because the congressional moratorium on agency regulation of MWC ash was scheduled to expire on November 15, 1992. See p. 14, *supra*.

[14] Statements that agency officials made to congressional committees advising the legislators of the agency's concerns and requesting clarification of Section 3001(i)'s ambiguous statutory language, see p. 13, *supra*, obviously do not constitute formal changes in agency policy.

But more fundamentally, a court is not entitled to ignore an administrative agency's interpretation simply because the agency has changed its mind—even if it has changed its mind several times. Indeed, this Court's decision in *Chevron* explicitly addresses that question:

> The fact that the agency has from time to time changed its interpretation * * * does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute.

467 U.S. at 863. The sole question is whether the Administrator has "amply justified his change of interpretation with a 'reasoned analysis.' " *Rust,* 111 S. Ct. at 1769. In this case, Administrator Reilly provided just such an analysis, and that currently outstanding interpretation is entitled to deference.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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